Supreme Court, U.S.
FILED
SEP 9 1991
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No. 91-160

In the Supreme Court of the United States

OCTOBER TERM, 1991

FIRST FEDERAL SAVINGS BANK & TRUST, ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

12 U.S.C. 1464(d)(2)(E) authorizes challenges to the appointment of a federal conservator or receiver "within 30 days [a]fter [it is appointed]," and Section 1464(d)(2)(G) otherwise precludes courts from taking "any action for or toward the removal of any conservator or receiver or, * * * to restrain or affect the exercise of powers or functions of a conservator or receiver." The question in this case is whether these provisions permit a federal savings association to obtain a prospective injunction preventing any future appointment of a receiver or conservator.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 927 F.2d 1345.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1991. A petition for rehearing was denied on May 21, 1991. Pet. App. 39a. The petition for a writ of certiorari was filed on July 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Director of the Office of Thrift Supervision ("OTS") generally is "authorized * * * to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings associations." 12 U.S.C. 1464(a). One of the Director's most important powers is his ability to appoint a conservator or receiver for a federal savings association, which he can do for any of ten separate reasons, including "insolvency," an "unsafe or unsound condition to transact business," a likely inability to "meet the demands of its depositors or pay its obligations in the normal course," or depletion of "all or substantially all of its capital." Section 1464(d)(2)(A). Recognizing the need for prompt action to avert further losses by failing institutions, Congress has granted the Director the "exclusive power and jurisdiction" to appoint a conservator or receiver for a federal savings association, and "authorized [the Director] to appoint [a conservator or receiver] ex parte and without notice." Section 1464(d)(2)(E).

To afford judicial review of these appointments, Section 1464(d)(2)(E) provides: "In the event of such appointment, the association may, within 30 days thereafter, bring an action in the United States district court * * * for an order requiring the Director to remove such conservator or receiver." Section 1464(d)(2)(G) expressly forecloses other avenues for judicial review: "Except as otherwise provided in [Section 1464(d)(2)(E)], no court may take any action or toward the removal of any conservator or receiver for or, except at the request of the Director, to restrain or affect the exercise of powers or functions of a conservator or receiver."

2. Petitioners in this case are First Federal Savings Bank & Trust (First Federal), a federal savings association subject to the Director's regulation, together with its parent holding company and two of its subsidiaries. Petitioners filed suit in the United States District Court for the Eastern District of Michigan, seeking, *inter alia*, a preliminary injunction that would prohibit the Director from appointing a conservator or receiver for First Federal, chiefly on the ground that the Director was not entitled to disregard so-called "supervisory goodwill" as an asset in determining First Federal's financial condition.[1] The district court denied petitioners' request, explaining orally that it was "without authority to enjoin the appointment, and to do so would circumvent the legislative scheme." Pet. App. 36a.

3. The court of appeals affirmed the district court's denial of a preliminary injunction. Pet. App. 27a.

a. First, relying on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), the court held (Pet. App. 13a-19a) that the dispute was not ripe for adjudication because the issues were not yet fit for judicial

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[1] Supervisory goodwill is the accounting term for an intangible "asset" that is created under certain circumstances in the merger and acquisition of thrift institutions. See Pet. App. 8a n.4. Petitioners contended that they had entered into an agreement with the Federal Home Loan Bank Board, a federal regulatory agency that preceded OTS, allowing petitioners to treat such goodwill as an asset for regulatory purposes for an extended period, and that their agreement was preserved notwithstanding changes in federal law restricting the use of such goodwill for thrifts generally. The government contended that there had been no such agreement, and, even if there had been, that subsequent changes in federal law had overridden the agreement. As the court of appeals recognized, these disagreements were "for the most part, irrelevant to the outcome of this dispute." Pet. App. 11a.

decision, and because postponing consideration would not cause the parties undue hardship. The court of appeals first noted that in order to resolve the dispute it would have to resolve the "intensely factual issues" surrounding the "financial status of the savings and loan," which would be "fully developed" only at the time an enforcement action actually occurred. *Id.* at 15a. Indeed, the court observed, any determination that it might make before a conservator or receiver actually had been appointed "could become outdated." *Id.* at 16a. In short, the court stated, "[t]here is just no way that we can be sure, as of now, that the OTS will *ever* choose to appoint a conservator or receiver, or the circumstances under which it would do so." *Id.* at 17a.

The court then held that withholding judicial review would not impose an undue hardship on the parties. Although petitioners "may feel nervous about the possibility of the appointment of a conservator or receiver," the court concluded that the mere risk of appointment does not "affect [their] behavior in any legally cognizable sense," because the mere possibility of appointment does not require petitioners to "make any investments or take any actions to meet regulatory requirements." Pet. App. 18a.

b. The court also determined (Pet. App. 19a-23a) that Section 1464(d)(2)(G) would preclude adjudication of petitioners' claims even if they were ripe. The court noted that the congressional grant of "exclusive power and jurisdiction to appoint a conservator or receiver" to the Director of OTS, 12 U.S.C. 1464(d)(2)(E), would be rendered "essentially meaningless" if federal thrifts "could run to the nearest federal court and get an injunction upon the potential

threat of having a conservator or receiver appointed." Pet. App. 20a. The language of the Section, which provides for review "[i]n the event of such appointment" within 30 days "thereafter," also suggested to the court "that review is only available *after* a conservator or receiver has been appointed." *Id.* at 21a (emphasis added). The court found "further support" in 12 U.S.C. 1464(d)(2)(G), which prohibits interference with the actions of a conservator or receiver, except in accordance with the post-appointment review provisions of subsection (E). In its view, the availability of pre-appointment injunctions "would render the anti-injunction provision nugatory." Pet. App. 21a.[2]

c. Finally, the court found that the statutory scheme did not deprive petitioners of procedural due process by preventing pre-appointment review of the decision to appoint a receiver. The court noted that this Court had rejected a similar challenge in *Fahey* v. *Mallonee*, 332 U.S. 245 (1947). It then proceeded to apply the three-prong test set forth in *Fuentes* v. *Shevin*, 407 U.S. 67, 91 (1972), and concluded that the statute provides all the process that is due under the Constitution. The court noted the strong public interest in the safety of the banking system, the need for prompt action in dealing with failing depository institutions, and the specific procedures in the statute that govern the Director's decision to appoint a receiver. Pet. App. 25a-26a. The court rejected peti-

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[2] Judge Contie dissented. Pet. App. 27a-31a. Relying on 12 U.S.C. 1464(d)(1)(A), he argued that the district court had the power to issue an injunction preventing "appointment of a receiver on the ground that OTS's enforcement of its regulations concerning supervisory goodwill abrogates First Federal's prior contract with the FHLBB." Pet. App. 31a.

tioners' claims that the post-deprivation remedy was inadequate, noting that petitioners can seek immediate removal of the receiver and that they also can seek damages if the appointment is wrongful. *Id.* at 26a.[3]

ARGUMENT

1. Petitioners do not challenge the court of appeals' determination that their suit is not "ripe for review." Pet. App. 13a-19a. Thus, whatever the strength of petitioners' other arguments, review is not warranted because those arguments offer little or no basis for disturbing the judgment of the court of appeals. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183-184 (1959) (dismissing a writ of certiorari as improvidently granted); cf. *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (the Court's power "is to correct wrong judgments, not to revise opinions").

2. Petitioner's principal contention (Pet. 14-27)[4] is that the court of appeals erred in determining that

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[3] The Director has not yet appointed a receiver or conservator for First Federal.

[4] Contrary to petitioners' contention (Pet. 11-14), their petition does not properly present the issues regarding the application of recently enhanced thrift capital standards raised by the petitioners in No. 90-1881, *Franklin Federal Savings Bank* v. *Director, Office of Thrift Supervision.* Because the court of appeals found that petitioners' request for an injunction against appointment of a receiver was both unripe and barred by Section 1464(d)(2)(G), and because that request was the only issue raised on the appeal, it had no occasion to consider their claim that OTS's refusal to approve their capital plan violated an agreement with the Federal Home Loan Bank Board regarding the appropriate accounting treatment of supervisory goodwill, see note 1, *supra.* In any event, for the reasons discussed in our brief in opposition in *Franklin Federal*, at 7-11, this claim does not merit

Section 1464(d)(2) does not permit a court prospectively to enjoin the Director from appointing a conservator or receiver for a federal savings association. Because the court below was the first court of appeals to address the issue,[5] there is no reason for the Court to review the issue at this time. In any event, the decision of the court of appeals is correct.

a. 12 U.S.C. 1464(d)(2)(G) states that "no court may take any action for or toward the removal of any conservator or receiver or, except at the request of the Director, to restrain or affect the exercise of powers or functions of a conservator or receiver," except as provided in "this subsection." The only applicable exception is contained in Section 1464(d)(2)(E), which provides that, "[i]n the event of such appointment, the association may, within 30 days *thereafter*, bring an action * * * to remove such conservator or receiver" (emphasis added). Because an order barring appointment of a receiver would "restrain or affect the exercise of powers * * * of a * * * receiver"—by totally barring any exercise of powers—and because petitioners did not bring their action within 30 days after such an appointment (because no such appointment has been made), the court of appeals correctly concluded that Section 1464(d) bars the relief sought by petitioners.

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review by this Court. We have provided counsel for petitioners a copy of our brief in opposition in *Franklin Federal.*

[5] The Third Circuit considered a related issue in *Greater Delaware Valley Federal Sav. & Loan Ass'n* v. *FHLBB*, 262 F.2d 371, 373-374 (1958). That case turned on whether an earlier version of Section 1464(d) permitted prospective challenges to the appointment of a similar official (a "Supervisory Representative in Charge"), and concluded that judicial intervention before appointment was not permitted.

This common-sense reading of Section 1464(d) is bolstered by the first sentence of Section 1462(d)(2)(E), which grants the Director the "exclusive power and jurisdiction to appoint a conservator or receiver for a Federal savings association," and authorizes the Director to make such appointments "ex parte and without notice." The court of appeals correctly noted that allowing federal thrifts to seek an injunction against the appointment of a conservator or receiver would "totally undermin[e] th[is] statutory allocation of authority." Pet. App. 21a. Taken in context, these provisions demonstrate that Congress did not intend to permit district courts to grant the relief petitioners sought in the district court.

Petitioners assert (Pet. 15-17) that the court of appeals' application of the statute is inconsistent with the "strong presumption that Congress intends judicial review of administrative action," Pet. 15. But nothing in the court of appeals' opinion forecloses judicial review of the Director's decision to appoint a receiver. That court recognized that Section 1464(d)(2)(E) explicitly authorizes courts to review such an appointment at any time within the 30 days immediately after the appointment. Pet. App. 20a. A court does not preclude judicial review when it requires a claimant to seek review in accordance with the time constraints adopted by Congress. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244-245 (1980).

Nor is there merit in petitioners' claim (Pet. 16-17) that Section 1464(d)(1)(A) grants the district court jurisdiction to issue a prospective injunction prohibiting the Director from appointing a receiver. Section 1464(d)(1)(A) does not address challenges to the appointment of a receiver. It merely states:

> Except as otherwise provided, the Director shall be subject to suit * * * by any Federal savings association * * * with respect to any matter under this section or any other applicable law, or regulation thereunder, in the United States district court for the judicial district in which the savings association's home office is located, or in the United States District Court for the District of Columbia.

It is implausible to argue that this general waiver of immunity should control the specific provisions in Section 1464(d)(2) barring pre-appointment challenges to the Director's decision to appoint a receiver; to use the words of subsection (1)(A), surely Congress has "otherwise provided" in subsections (2)(E) and (G) where it specifically addresses judicial challenges to the appointment of a receiver. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983) ("a precisely drawn, detailed statute pre-empts more general remedies").[6]

b. Petitioners also contend (Pet. 18-27) that the court of appeals' conclusion barring pre-appointment

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[6] Petitioner relies (Pet. 17) on the district court decision in *Century Federal Savings Bank* v. *United States*, 745 F. Supp. 1363 (N.D. Ill. 1990). The district court in that case stated in dictum that Section 1464(d)(1)(A) offers an independent source of jurisdiction to issue a prospective injunction prohibiting the Director from appointing a receiver, 745 F. Supp. at 1366-1367, but declined to issue an injunction in that case, *id.* at 1367-1370. Because the *Century Federal* court reached the same result as the court below, the conflict between their analyses is considerably attenuated. In any event, the existence of a conflict between the decision of a district court and a court of appeals generally is not an adequate basis for issuance of a writ of certiorari. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.8 (6th ed. 1986).

challenges must be incorrect because it leaves petitioners with a remedy that is "constitutionally unacceptable," Pet. 18, either because it fails to accord petitioners a pre-deprivation hearing, or because the scope of review in the post-deprivation hearing is unduly narrow. Both of these contentions are meritless.

It is well settled that the Constitution permits seizure of an unsuccessful financial institution without a pre-deprivation hearing. Over 40 years ago, in *Fahey* v. *Mallonee*, 332 U.S. 245 (1947), this Court rejected a claim that federal regulatory authorities had deprived the owners of a failed thrift of due process by applying regulations that provided for a hearing to challenge the appointment of a conservator or receiver "after the conservator takes possession instead of before," *id.* at 253. As the Court explained,

> the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in light of the history and customs of banking we cannot say it is unconstitutional.

Id. at 253-254. Because of the strong public interest in prompt action, and the availability of prompt post-deprivation review, federal courts regularly have upheld provisions similar to Section 1464(d)(2)(G). See *Haralson* v. *Federal Home Loan Bank Board*, 837 F.2d 1123, 1126-1127 (D.C. Cir. 1988); *Woods* v. *Federal Home Loan Bank Board*, 826 F.2d 1400, 1410-1413 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988); Pet. App. 25a ("the insolvent savings and loan is one of the classic situations in which prompt action is necessary").

Petitioners also claim in this Court (Pet. 20-22, 27) for the first time that the statutory framework deprives petitioners of due process by limiting post-deprivation review to the administrative record. Putting to one side this Court's general practice of not passing on arguments that were not presented to the court of appeals, see, *e.g.*, *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981), this claim is not persuasive. See *Franklin Savings Association* v. *Office of Thrift Supervision*, 934 F.2d 1127, 1140 (10th Cir. 1991) (concluding that post-appointment review on OTS's administrative record is adequate); *Woods*, 826 F.2d at 1410-1413 (rejecting a similar challenge to an earlier version of 12 U.S.C. 1464(d)(2)(E)). As these courts have recognized, the statutory procedures provide petitioners a full and fair opportunity to defend themselves.

c. Petitioners also contend (Pet. 27-30) that the court of appeals' conclusion that prospective injunctive relief is not available under Section 1464(d)(1)(A) conflicts with the Federal Circuit's decision in *Far West Federal Bank* v. *Office of Thrift Supervision*, 930 F.2d 883 (1991). Nothing in that case conflicts with the decision of the court of appeals in this case; in *Far West* the Federal Circuit considered whether the relief sought from the FDIC and OTS in that case could be sought only in the Claims Court under 28 U.S.C. 1491(a)(1), 930 F.2d at 888. The Federal Circuit's conclusion that certain claims did not constitute claims within the exclusive *jurisdiction* of the Claims Court—and thus could be presented to the regional district courts—says nothing about the *merits* of the claims raised by the institution in that case or by petitioners here.[7]

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[7] Petitioners also seem to suggest (Pet. 27-28, 30) that the Just Compensation Clause of the Fifth Amendment requires

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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prospective injunctive relief against an anticipated taking, and that the decision of the court of appeals contravenes this principle. This suggestion is meritless. As the Court explained in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), the Just Compensation Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* at 314. "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interferences with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.* at 315. Petitioners' reliance (Pet. 30) on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), for a contrary rule is inexplicable. That case did not hold that injunctive relief is available to remedy a wrongful taking; it held that the President's action was an unconstitutional usurpation of legislative authority.

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